Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DON SANDOVAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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51 pp

QUESTION PRESENTED FOR REVIEW

Whether the First Circuit properly subjected petitioner to both a prison sentence and a new term of supervised release when this sentence would not have been imposed in nine other federal circuits?

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IN THE

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OCTOBER TERM, 1995

DON SANDOVAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

INTRODUCTORY STATEMENT

The petitioner requests that a writ of certiorari be issued to review the decision of the United States Court of

Appeals for the First Circuit based on the grounds that:

1) the decision of the lower court expressly relied on the First Circuit decision of *United States v. O'Neil*, 11 F.3d 292 (1st Cir. 1993), whose rationale directly conflicts with the opinions of nine other circuit courts of appeal; and

2) this Court should resolve the conflict within the circuits between the *O'Neil* holding and the decisional law of the other circuits.

Petitioner therefore respectfully requests that a writ of certiorari be issued to review the judgment of the First Circuit Court of Appeals, in *United States v. Don Sandoval*, No. 95-1326, *reh. denied*, which affirmed the district court's imposition of an additional term of supervised release following petitioner's imprisonment for a supervised release violation. The opinion is attached as Appendix "A" and the denial of the petition for rehearing is attached as Appendix "B".

This case presents a serious question of federal law for

which the circuit courts of appeal are in direct conflict. The Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits have disallowed the imposition of an additional term of supervised release following imprisonment on a supervised release revocation pursuant to 18 U.S.C. § 3583.[1] The First and Eighth Circuits allow courts to impose the additional term, and the District of Columbia Court of Appeals has not addressed this issue to date. Therefore, the federal circuit courts are in need of resolution and unanimity on this important question of federal law.

OPINION IN THE COURT BELOW

The opinion of the Court of Appeals affirming the ruling of the district court is officially reported as *United States v. Don Sandoval*, 69 F.3d 531 (1st Cir. 1995) (*per curiam*), *reh. denied* (Jan. 12, 1996).

A copy of the opinion is attached as Appendix "A" and

[1] In 1994, Congress passed a law which permits the imposition of a prison term followed by an additional term of supervised release. However, petitioner was sentenced for crimes which he committed in 1991 and 1992, so the old law applies to the instant case.

the denial of the petition for rehearing is attached as Appendix "B".

STATEMENT OF JURISDICTION

On November 7, 1995, the First Circuit Court of Appeals entered judgment affirming the district court's sentence in this case. The First Circuit's order denying rehearing was entered on January 12, 1996. This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. 1254(1).

In this case the circuit courts of appeal are in direct conflict on an issue of federal law. This conflict has not been, but should be, settled by this Court.

I. A CONFLICT EXISTS WITHIN THE FEDERAL CASE LAW WHICH MUST BE RESOLVED BY THIS COURT

The decision of the Court of Appeals in this case relied almost exclusively on *United States v. O'Neil*, 11 F.3d 292 (1st Cir. 1993). In relying on this pre-existing authority, the panel failed to take into account the nine other circuit courts of appeal which have disposed of this issue in the opposite way.

Specifically, in 1993 the First Circuit in *O'Neil* held that pursuant to 18 U.S.C. § 3583(e)(3), a district court may sentence a criminal defendant to a term of imprisonment as a penalty for violating his supervised release, and then impose an additional term of supervised release at the expiration of the prison term. *O'Neil*, 11 F.3d at 293.

In that decision, the *O'Neil* Court recognized and acknowledged that this interpretation was not consistent with the rationales of a minimum of six other circuits. The cases cited in opposition by the *O'Neil* Court include *United States v. Truss*, 4 F.3d 437, 438 (6th Cir. 1993), *United States v. McGee*, 981 F.2d 271, 274-276 (7th Cir. 1992), *United States v. Koehler*, 973 F.2d 132, 134-136 (2d Cir. 1992), *United States v. Cooper*, 962 F.2d 339, 340-342 (4th Cir. 1992), *United States v. Holmes*, 954 F.2d 270, 271-273 (5th Cir. 1992), and *United States v. Behnezhad*, 907 F.2d 896, 898-899 (9th Cir. 1990). *O'Neil*, 11 F.3d at 294. Since the First Circuit announced the *O'Neil* decision, the Third, Tenth and

Eleventh circuits have handed down decisions in accord with the majority of the circuits in the cases of *United States v. Malesic*, 18 F.3d 205, 207 (3d Cir. 1994), *United States v. Rockwell*, 984 F.2d 111[illegible] (10th Cir. 1993), and *United States v. Tatum*, 998 F.2d 893, 894-895 (11th Cir. 1993), respectively.

There now exists a conflict within the federal case law which must be resolved by this Court. Failure to do so will result in disparate procedures and results within the federal circuit courts.

STATUTE INVOLVED

Title 18 U.S.C. § 3583(e)(3), provides as follows:

> **(e) Modification of conditions or revocation. --**
> The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6) --
>
> (3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post release supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable

> to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case . . .

STATEMENT OF THE CASE

On July 1, 1994, petitioner DON SANDOVAL pled guilty to a conspiracy to distribute anabolic steroids (21 U.S.C. § 846), which occurred between October 1991 and April 1992. On September 2, 1994, the Honorable Mary M. Lisi, United States District Court Judge, sentenced Mr. SANDOVAL to 176 days in custody, a five year term of supervised release, and a fine of $42,126.80.

Mr. SANDOVAL violated the terms of his supervised release by first leaving the federal district of Rhode Island without obtaining permission from his probation officer, and later failing to report to his probation officer. On October 26,

1994, the district court issued an arrest warrant for Mr. SANDOVAL.

The district court held a revocation hearing on March 10, 1995. The Court sentenced Mr. SANDOVAL to a nine month term of imprisonment, as well as an additional supervised release term of four years and three months.

As a result of this decision, the petitioner filed an appeal with the First Circuit Court of Appeals. On November 7, 1995, that court filed a *per curiam* affirming the petitioner's sentence in its entirety. See Appendix "A." Petitioner filed a petition for rehearing, which the First Circuit Court of Appeals denied on January 12, 1996. See Appendix "B."

REASONS FOR ALLOWANCE OF THE WRIT

I. THE FIRST CIRCUIT COURT OF APPEALS RULING IMPROPERLY SUBJECTED PETITIONER TO BOTH A PRISON SENTENCE AND A NEW TERM OF SUPERVISED RELEASE WHEN THIS SENTENCE WOULD NOT HAVE BEEN IMPOSED IN NINE OTHER FEDERAL CIRCUITS

The Circuit Courts of Appeal are split as to the interpretation of Title 18, U.S.C. § 3583(e)(3), and Congress'

intent in enacting that statute. This issue is one of great importance, as it directly implicates criminal defendant's liberty interests.

In the instant case the district court sentenced Mr. SANDOVAL to nine months in jail and an additional four years and three months of supervised release. The First Circuit Court of Appeals decision affirming the sentence, is based exclusively on its decision in *United States v. O'Neil*, 11 F.3d 292 (1st Cir. 1993) and its progeny. *O'Neil* interprets § 3583(e)(3), as permitting the prison sentence followed by an additional term of supervised release at the expiration of the prison term. *O'Neil*, 11 F.3d at 293.

However, nine other circuit courts of appeal have read § 3583(e)(3) as standing for the opposite proposition, that a court may not revoke a defendant's supervised release, sentence him to custody, and also add on another term of supervised release. The Second Circuit, *United States v. Koehler*, 973 F.2d 132, 134-136 (2d Cir. 1992), Third Circuit,

United States v. Malesic, 18 F.3d 205, 207 (3d Cir. 1994), Fourth Circuit, *United States v. Cooper*, 962 F.2d 339, 340-342 (4th Cir. 1992), Fifth Circuit, *United States v. Holmes*, 954 F.2d 270, 271-273 (5th Cir. 1992), Sixth Circuit, *United States v. Truss*, 4 F.3d 437, 438 (6th Cir. 1993), Seventh Circuit, *United States v. McGee*, 981 F.2d 271, 274-276 (7th Cir. 1992), Ninth Circuit, *United States v. Behnezhad*, 907 F.2d 896, 898-899 (9th Cir. 1990), Tenth Circuit, *United States v. Rockwell*, 984 F.2d 1112 (10th Cir. 1993), and Eleventh Circuit, *United States v. Tatum*, 998 F.2d 893, 894-895 (11th Cir. 1993) are all in accord on this point. Only the First and Eighth Circuits differ.

Rule 10 of the Rules of the Supreme Court of the United States states that certiorari will generally be granted as to a question of law where the decisions of the federal circuit courts of appeal are clearly in conflict.[2] See also, *McElroy v.*

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[2] Rule 10 states in pertinent part that:

1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character

United States, 455 U.S. 642, 643 (1982); *Marks v. United States*, 430 U.S. 188, 189 (1977). In the instant case nine circuit courts of appeal have held that § 3583(e)(3) does not permit a district court to impose an additional term of supervised release, following a prison sentence for violating supervised release. Two other circuit courts have held to the contrary, and allowed such a sentence. Therefore, there is a direct conflict between the circuits which this Court must resolve in order to preserve uniformity of decision between the federal circuit courts, and to prevent unfair results, such as the sentence in the case at bar.

II. IT IS ARBITRARY AND UNFAIR TO SUBJECT A CRIMINAL DEFENDANT TO BOTH A PRISON SENTENCE AND A NEW TERM OF SUPERVISED RELEASE WHEN THIS SENTENCE WOULD NOT HAVE BEEN IMPOSED IN NINE OTHER FEDERAL CIRCUITS

If the petitioner had violated his supervised release in

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of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter;

California, he would have had his supervised release revoked, he would have been sentenced to an additional term of imprisonment, and he would not now be on supervised release. The petitioner would not have received the sentence he did in Texas, West Virginia, New York, or any other state which is part of the nine federal circuits which do not allow such a sentence. It is both arbitrary and capricious that due to geography, Mr. SANDOVAL has received a sentence unlike that of any other criminal defendant in those nine circuits. The federal courts are part of a uniform system of justice, and justice should be administered in each federal circuit with an eye towards uniformity of decision in order to prevent unfair results, such as the sentence in the case at bar.

The Ninth Circuit Court of Appeals was the first court to hold that a court may modify the conditions and extend the length of a defendant's supervised release or revoke supervised release and reincarcerate the person, but not both. *Behnezhad*, 907 F.2d at 898-899. The Ninth Circuit

stated that a statute written in the disjunctive sets forth discrete alternatives. The Court also held that Congress' intent in writing § 3583 was to set out two distinct alternatives from which a sentencing court may choose, rather than a dual punishment. *Id.*

The Fifth Circuit Court of Appeals' reasoning in *United States v. Holmes*, 954 F.2d at 270, mirrors that of the Ninth Circuit. The Fifth Circuit held that the plain meaning of § 3583 "does not authorize recommencement of supervised release after revocation." *Id.* at 272. In *Holmes*, the Fifth Circuit also noted that § 3583(e) does not provide for an additional term of supervised release. Supervised release is authorized pursuant to § 3583(a), which "is clearly limited to the time of sentencing." *Id.*

The next circuit court to address this issue was the Fourth Circuit, in the case of *United States v. Cooper*, 962 F.2d at 339; see also, *United States v. Parriett*, 974 F.2d 523, 527 (4th Cir. 1992). The Fourth Circuit specifically adopted

the Fifth and Ninth Circuits' reasoning that a statute written in the disjunctive must be read as providing the Court with separate and distinct sentencing alternatives. The Fourth Circuit also agreed with the Fifth Circuit that "because it is logically impossible to extend a term of supervised release after it has been revoked, a court may not combine the alternatives within section 3583(e)." *Cooper*, 962 F.2d at 341.

The Second Circuit cited *Holmes*, 954 F.2d at 272, for the proposition that "[r]evocation of the original term of supervised release and imposition of a prison term under subdivision (3) of § 3583(e) is linguistically inconsistent with extension or modification of that term under subdivision (2)." *United State v. Koehler*, 973 F.2d at 132. The Second Circuit went on to state that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Id.* at 135.

In its decision holding that § 3583 creates separate and discrete sentencing alternatives the Seventh Circuit outlined all

of the prior caselaw interpreting this statute. *United States v. McGee*, 981 F.2d at 271. The Court went on to specifically adopt the Fifth Circuit's reasoning in *Holmes* that if a court revokes supervised release under § 3583, no residual term of supervised release survives the additional imprisonment. *McGee*, 981 F.2d at 275-276.

The Tenth Circuit Court of Appeals had initially interpreted § 3583 to permit the imposition of an additional term of supervised release following revocation. *United States v. Boling*, 947 F.2d 1461 (10th Cir. 1991). In the case of *United States v. Rockwell*, 984 F.2d at 1112 (10th Cir. 1993), the Tenth Circuit Court of Appeals specifically overruled the *Boling* decision. The *Rockwell* Court sets forth three specific reasons for the shift in its interpretation of § 3583. The first and most important reason is that seven other circuits had specifically held or implied that § 3583 did not permit a judge to impose both an additional term of imprisonment and then additional supervised release. *Rockwell*, 984 F.2d at 1114.

The Tenth Circuit's second reason to reverse its earlier decision was that no further legislation had been enacted in response to the other circuit court's decisions. *Id.* The Tenth Circuit's last reason to reverse *Boling* is that that decision relies on policy statements to the Sentencing Guidelines which are not mandatory, but only persuasive. *Id.* at 1116-1117.

Following the *Rockwell* decision, the Eleventh Circuit Court of Appeals decided the case of *United States v. Tatum*, 998 F.2d at 893. In that case the Eleventh Circuit adopted the other circuits' common interpretation of § 3583. The Court based its holding on the fact that six other circuit's had specifically held that § 3583 did not permit imprisonment followed by an additional term of supervised release. *Id.* at 895; see also, *United State v. Williams*, 2 F.3d 363 (11th Cir. 1993). The Eleventh Circuit also found that the plain and unambiguous language of the statute creates alternative sentences for the Court, which allow it to revoke or modify a defendant's supervised release, but not both. *Tatum*, *supra*.

The Sixth Circuit held that after revoking defendant's supervised release, the district court does not have the authority to sentence the defendant to a term of imprisonment, and to order a new term of supervised release. *Truss*, 4 F.3d at 437. The *Truss* Court based its decision in part on the fact that seven other circuit courts have interpreted § 3583 in this manner, making it a clear majority view. *Id.* at 439. The Sixth Circuit adopted the Fifth Circuit's reasoning from *Holmes* that § 3583 contemplates complete revocation of supervised release or a modification of the supervised release terms, but not both. *Truss*, 4 F.3d at 439-440.

The last circuit court to join the majority on this issue is the Third Circuit. In the case of *United States v. Malesic*, 18 F.3d at 205, the Court held that once supervised release has been revoked pursuant to § 3583, there can be nothing left for the court to extend, modify, reduce or enlarge under that code section. *Id.* at 207-208.

Nine Circuit Courts of Appeal have agreed that the language of § 3583 does not permit the revocation of supervised release, followed by an additional term of supervised release. Only two circuits have found to the contrary. Nine circuits have found that such a sentence is not permitted under § 3583, and it would be unfair to defendants in the other two circuits to permit the arbitrary imposition of an additional term of supervised release following imprisonment due solely to the location in which their case occurred. Had Mr. SANDOVAL been sentenced in Los Angeles, California, New York, New York, Chicago, Illinois, Honolulu, Hawaii, Dallas, Texas, or Columbus, Ohio he would not now be on supervised release. This Court should act to achieve uniformity of decision among the federal circuits.

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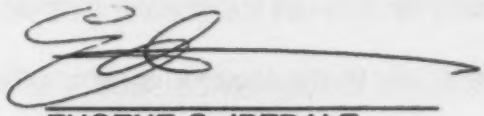
CONCLUSION

For the reasons set forth above, petitioner requests that this Court grant his petition for a writ of certiorari to review the decision of the First Circuit Court of Appeals, and set the case for briefing and oral argument.

Dated: April 9, 1996 Respectfully submitted,



EUGENE G. IREDALE
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DON SANDOVAL

[NOT FOR PUBLICATION]

United States Court of Appeals

For the First Circuit

No. 95-1326

UNITED STATES,

Appellee,

v.

DON SANDOVAL,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

(Hon. Mary M. Lisi, U.S. District Judge)

APPENDIX A

(continued...)

Before

Selya, Cyr and Boudin,

Circuit Judges.

Don Sandoval on brief pro se.

Sheldon Whitehouse, United States Attorney, Margaret E. Curran and Gerard B. Sullivan, Assistant United States Attorneys, on brief for appellee.

November 7, 1995

Per Curiam. Defendant Don Sandoval appeals from the sentence the district court imposed on him following the revocation of a term of supervised release. The court sentenced defendant to both a term of imprisonment and a term of supervised release. Defendant first argues that the supervised release revocation provision, 18 U.S.C. § 3583(e) (3), does not permit the imposition of a term of supervised release and a term of imprisonment. We rejected this precise argument in United States v. O'Neil, 11 F.3d 292 (1st Cir. 1993), and re-affirmed our position in United States v. LaPlante, 28 F.3d 1 (1st Cir. 1994) (per curiam), cert. denied, 115 S.Ct. 910 (1995). Defendant has not presented any persuasive reasons why we should change this recent statement of the law.

Defendant's second argument on appeal is that the district court violated the prohibition of the ex post facto clause by applying § 3583 (h) to him. This section was added

in 1994. It specifically provides that when revoking a term of supervised release under subsection (e) (3), a district court may include a requirement of supervised release after imprisonment.

To fall within the ex post facto prohibition the new law "must disadvantage the offender affected by it." Miller v. Florida, 482 U.S. 423, 430 (1987) (internal quotations and citation omitted). Assuming the district court used subsection (h), defendant was not disadvantaged. In O'Neil, we already had construed subsection (e) (3) to permit what subsection (h) now grants expressly. Cf. United States v. Hartman, 57 F.3d 670, 671 (8th Cir. 1995) (per curiam) (the legislative history of subsection (h) shows that subsection (e) (3) permits both incarceration and supervised release).

Based on the foregoing, the judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 95-1326

UNITED STATES,

Appellee,

v.

DON SANDOVAL,

Defendant, Appellant.

Before

Torruella, Chief Judge,

Selya, Cyr and Boudin, Stahl and Lynch,

APPENDIX B

(continued...)

Circuit Judges.

ORDER OF COURT

Entered January 12, 1996

The motion for rehearing and suggestion for rehearing in banc is denied.

By the Court:

/s/ Jancie M. O'Neil

Janice M. O'Neil

Acting Clerk.

[cc: Messrs. Gaynor, Sullivan and Sandoval]